No. 88-1837

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN SMITH,

Petitioner,

—v.—

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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22 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a court may issue a permanent injunction prohibiting a woman from having an abortion, upon a motion by a man claiming to have caused the woman's pregnancy.

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IN THE

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OCTOBER TERM, 1988

No. 88-1837

JOHN SMITH,

Petitioner,

—v.—

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jane Doe submits this brief in opposition to the petition for a writ of certiorari filed by John Smith, which seeks review of the judgment entered by the Indiana Court of Appeals in this action, *Jane Doe v. John Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988). P.A. 1a-3a.[1] Mr. Smith's petition fails to establish any of the factors that would support review on a writ of certiorari. The Indiana Court

1 Citations to documents contained in the record on appeal will be to the record page number in the form R. _____; to the Petition for a Writ of Certiorari as Pet. _____; to the Appendix to the Petition for a Writ of Certiorari as P.A. _____; and to the Appendix to Respondent's Brief in Opposition as R.A. _____. In the Indiana Court of Appeals, pseudonyms were substituted for the names of the parties in order to protect their privacy, although actual names were used in the original petition and order. The record of the trial court hearing has been sealed.

of Appeals properly applied this Court's prior decisions, which are dispositive. Moreover, no conflict exists among state or federal appellate courts as to the proper resolution of the question presented in this case. *See* Sup. Ct. R. 17.

COUNTERSTATEMENT OF THE CASE

On April 4, 1988, the Juvenile Division of the Vigo Circuit Court (the "juvenile court") in Terre Haute, Indiana issued a Temporary Restraining Order ("TRO"), without notice or hearing, ordering Jane Doe not to terminate her first trimester pregnancy. R. 14; R.A. 1a.[2] The TRO also ordered "any abortion clinic, abortion facility, employee thereof, and any physician to restrain from performing an abortion upon Jane Doe." *Id.* Accompanying the restraining order was an "Order To Show Cause," requiring Ms. Doe to appear before the court, without protection of a pseudonym, to explain and defend her personal decision to terminate her pregnancy. The court issued the TRO solely upon the motion of John Smith, who initiated a paternity proceeding alleging that he was the prospective "father" of Ms. Doe's fetus and seeking a permanent injunction compelling Doe to bear his child.

Ms. Doe responded on April 5, 1988 with a Motion to Dismiss, citing her constitutional right to make her own decision

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2 This case is but one of a series of cases wherein counsel for the Petitioner, James Bopp, Jr., Esq., has represented men seeking to interfere with the decisions of individual women to have abortions. This Court has recently declined to consider these claims, *see Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App.), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347); *Myers v. Lewis*, No. 111440 (Mich. App. 1988), *application for stay denied*, 109 S. Ct. 28, *cert. denied*, 109 S. Ct. 391 (1988). In the Spring of 1988, Mr. Bopp produced and distributed a "Father's Rights Litigation Kit," a compilation of eleven model court papers for use in preventing women from obtaining abortions. *See* J. Bopp, R. Coleson, B. Balch and M. Spaulding, *Father's Rights Litigation Kit: Judicial Balancing of Paternal and Maternal Rights and Interests Where the Right of the Mother to Obtain an Abortion is Challenged by the Father* (1988).

about whether to have an abortion as recognized by this Court in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Ms. Doe also contended that Mr. Smith was not responsible for her pregnancy.

The next day, responding to a motion by Mr. Smith, the court ordered a man identified by Smith as Ms. Doe's physician to turn over all of Ms. Doe's medical records together with a "signed affidavit summarizing his testimony herein concerning the issues raised by this paternity action, the pregnancy of Respondent and any proposed termination of said pregnancy." R. 19; R.A. 3a. On April 6, Ms. Doe moved the juvenile court to rescind that order on the ground that it required the physician to divulge information that was protected by the physician-patient privilege and that the court lacked jurisdiction either to issue the order or to hear the original action. She also filed a supplemental motion to dismiss, arguing, in effect, that the Indiana paternity statute did not purport to authorize the issuance of the TRO and that if it did, it unconstitutionally deprived her of her constitutional right to end her pregnancy.

The juvenile court held an emergency hearing on April 7, 1988 to consider both Smith's paternity petition and his request for an injunctive order compelling Ms. Doe to carry her pregnancy to term. The court ruled that it had jurisdiction to conduct the proceeding and noted Ms. Doe's continuing objection to the court's jurisdiction. At the April 7 hearing, John Smith and three other witnesses testified in favor of the motion. Findings No. 1 and 2, P.A. 5a. Mr. Smith testified to the most intimate details of his relationship with Ms. Doe, and also described the reasons *he* believed Ms. Doe was choosing to have an abortion.

Three of Doe and Smith's acquaintances, none of whom had known Ms. Doe and Mr. Smith for more than six months, testified on Mr. Smith's behalf about intimate details of Mr. Smith's relationship with Ms. Doe. R. 94, 101, 111. Ms. Doe's physician was subpoenaed and the court ordered him to testify. Although the court held that the physician's testimony as to

most matters was inadmissible due to the physician-patient privilege, the court did allow him to introduce some privileged information. R. 164-173.

Ms. Doe, though present, objected to this invasive judicial proceeding as a violation of her constitutional right to privacy and refused to testify or present evidence on her own behalf. Ms. Doe's refusal was justified because the very nature of the proceedings undermined her privacy rights. Profoundly intimate and sensitive matters were explored at the hearing, ranging from the frequency and precise nature of Ms. Doe's sexual relations with Mr. Smith to the personal and sexual history of her sister. Findings No. 4 and 5, P.A. 5a; R. 31.

The court relied solely on Mr. Smith's testimony in making the unsubstantiated finding that:

> [T]he Respondent wishes to avoid childbirth, she wishes to look nice in a bathing suit this summer, her desire not to be pregnant in the summertime, and her desire not to share the petitioner with the baby.

Finding No. 14, P.A. 6a. In making his findings, the juvenile court ignored Mr. Smith's contradictory statements and testimony that illustrated his ignorance about what Ms. Doe thought of her situation. For example, Mr. Smith stated that Ms. Doe "didn't discuss with me very much about what the doctor said," R. 145; that Ms. Doe told him that she "can't have a child in her life, uh, that she's not ready for the responsibilities," R. 147; and that, with respect to the abortion decision, "we haven't discussed anything except my side." R. 152.

On April 8, the juvenile court entered its Findings of Fact and Conclusions of Law and Order, in which it permanently enjoined Ms. Doe from obtaining an abortion. R. 42-46; P.A. 5a-10a. In a highly irregular departure from accepted notions of judicially cognizable facts, the court found *inter alia*, that "[p]etitioner is in love with Respondent," Finding No. 8, P.A. 6a, that "[t]here is no evidence that maternity may force upon the Respondent a distressful life or future," Finding No. 11, P.A. 6a, and that Jane Doe "is a very pleasant young lady,

slender in stature and well able to carry to delivery without an undue burden." Finding No. 18, P.A. 7a. The court went so far as to hold that: "Factors considered in *Roe v. Wade* do not exist here where the mother was relying on abortion rather than conception [sic]. That fact, and her other reasons for abortion are indicative of an extremely immature young woman which lessens the weight and nature of her privacy interest." Conclusion No. 13, P.A. 8a.

Due to the obvious time pressures involved, Ms. Doe asked the Supreme Court of Indiana for expedited review of the permanent injunction against her. Before the Supreme Court of Indiana considered her appeal, however, Ms. Doe terminated her pregnancy and so informed the court. R.A. 4a-5a. Thereafter, the Supreme Court of Indiana denied the request for expedited hearing, and Ms. Doe brought her appeal in the Indiana Court of Appeals, First District. The Indiana Court of Appeals, in a memorandum decision, unanimously reversed the juvenile court's order. P.A. 2a-3a. On February 9, 1989, the Indiana Supreme Court denied Mr. Smith's petition for transfer, and refused to hear his appeal. P.A. 4a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT'S PRIOR DECISIONS ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE INDIANA COURT OF APPEALS

A. Every Woman Has A Constitutional Right To Decide Whether or Not To Terminate Her Pregnancy

The United States Constitution guarantees every woman the fundamental right to decide, free from government intrusion, whether to end her pregnancy. This Court first clearly recognized this right to choose abortion in 1973, *see Roe v. Wade*, 410 U.S. 113 (1973), and has since consistently and unequivocally reaffirmed the right in numerous decisions, *see, e.g., City of Akron v. Akron Center for Reproductive Health*, 462 U.S.

416 (1983); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Most recently, the Court held that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

In 1976, this Court rejected the claim that the state may deprive a woman of her constitutional right to choose to have an abortion in order to promote the interests and wishes of her husband. *See Danforth*, 428 U.S. 52. The Missouri law at issue in *Danforth* prohibited a married woman from having an abortion without her husband's consent. The Court struck down that law and made clear that a woman's right to end an unwanted pregnancy may not be infringed on the basis of her husband's objections. *Id.* at 69-71.

Thus, this Court's decisions in *Roe* and *Danforth* are clearly dispositive. Moreover, every appellate court to consider the issue has held that a man may not obtain a court order enjoining a woman from exercising her right to decide to have an abortion.[3] This Court has just this term twice denied petitions

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3 This has been true in cases both where the man seeking the court order was the woman's husband, *Lewis*, No. 111440; *Conn*, 526 N.E.2d 958; *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988), *applications for stay denied*, 108 S. Ct. 2136 (1988) (Stevens, J., in chambers), No. A-88-55 (U.S. July 22, 1988) (White, J.) (letter from Clerk of the Court); *Jane Doe v. John Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988), *petition for cert. filed*, May 10, 1989 (No. 88-1837); *Jones v. Smith*, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974). Courts consistently denied such requests even prior to *Danforth*:

> "[*Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)] make crystalline . . . that a woman in the first trimester of pregnancy, in consultation with her physician, may elect to terminate the pregnancy, and neither the state nor the woman's spouse

(*footnote continued*)

for a writ of certiorari preventing this same question. *Myers v. Lewis*, No. 111440 (Mich. App. 1988), *application for stay denied*, 109 S. Ct. 28, *cert. denied*, 109 S. Ct. 391 (1988); *Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App.), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347).

Mr. Smith argues that *Danforth* is not dispositive because it involved a state statute giving all men the right to veto their wives' abortion decisions, whereas he is arguing for a case-by-case judicial determination of whether particular individual women can be forced to continue their pregnancies. This suggested distinction is irrelevant to Ms. Doe's constitutional rights at stake.[4] As the Court recognized in *Danforth*, "The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail." 428 U.S. at 71. Whether imposed by court order on a case-by-case basis or by state statute, the deprivation of a woman's constitutional right is equally complete, and the harm resulting from a court-ordered pregnancy and childbirth equally devastating.

Moreover, this Court has already rejected the case-by-case balancing of interests sought by Mr. Smith. The Court in *Danforth* expressly considered "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." 428 U.S. at 69. Nevertheless, the Court concluded that any balancing would be impermissible, because a woman's right to make the abortion decision outweighs her husband's

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nor the father of the child has any right to intervene so as to prevent her decision from becoming fact."

Coleman, 471 A.2d at 1119; *see also Doe*, 314 N.E.2d 128; *Jones*, 278 So. 2d 339.

4 Nevertheless, as discussed *infra*, the absence of a state statute here defeats Mr. Smith's claim that the state has a compelling interest that outweighs Ms. Doe's rights.

interests in each and every case: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Id.* at 71. Recognizing the unparalleled importance of a woman's right to control her reproductive capabilities, the Court has declared that every adult woman has the right to decide to have an abortion and to effectuate that decision without government interference, regardless of her very personal reasons and without having to reveal those reasons.

The facts of this case illustrate the wisdom of this Court's consistent rejection of any proposed balancing of interests. Courts are ill-equipped to evaluate the ethical, religious, medical, and personal factors involved in the decision whether to have a child. *Cf. Doe v. Bolton*, 410 U.S. 179, 195-98 (1973) (abortion decision may not be subject to ad hoc determinations of hospital committee). In order to draw his conclusions of law, the trial judge relied on unconventional factual findings such as "Petitioner is in love with Respondent." In addition, he relied solely on the appearance of Ms. Doe in the courtroom to determine that "she is a very pleasant young lady, slender in stature, healthy, and well able to carry a baby to delivery without an undue burden." The trial court judge, in attempting to balance Mr. Smith's "feelings" against Ms. Doe's reasons for not wanting to become a mother at this point in time, could rely on nothing more than his own purely subjective observations and personal beliefs.

A case-by-case judicial inquiry into these types of disputes not only undermines the bodily security and liberty interests guaranteed to women by the Constitution, but also presents courts with the impossible task of resolving countless highly personal disputes involving abortion, sterilization, and the use of birth control, between spouses and lovers. Moreover, allowing for case-by-case determinations of who may have an abortion permits any man claiming paternity to force a woman to appear in court to publicly defend, under cross-examination and before hostile witnesses, her private decision to terminate an unwanted pregnancy. Such proceedings violate a woman's

constitutionally protected right of privacy and, at best, impose unjustified and health-threatening delays on her ability to obtain an abortion. *See Akron*, 462 U.S. at 450.

B. Indiana Has Never Even Asserted That It Has A Compelling State Interest In Providing Men The Opportunity To Seek A Court Order Requiring A Woman To Carry A Pregnancy To Term

Mr. Smith contends that Indiana "has an interest in protecting the interests of fathers in their unborn children." Pet. 8-9. However, no Indiana statute purports to grant the relief sought by Mr. Smith and the state has not participated in this case.[5] *See Conn v. Conn*, 525 N.E.2d 612, 615-16 (Ind. Ct. App.) (noting that "Indiana has no statute proscribing abortion in the first trimester, nor does it have a statute requiring spousal consent," and rejecting the husband's argument for a case-by-case balancing of each spouse's interests as invalid and "based on some nebulous common law concept"), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347).

Indiana has unfailingly accepted this Court's decisions in *Roe* and *Danforth*, and has refused to legitimate the interests asserted by Mr. Smith. *See Conn v. Conn*, 525 N.E.2d at 615-16 ("the decisions in *Roe* and *Danforth* have been mentioned uncritically in the following Indiana cases: [*Razo v. State*, 431 N.E.2d 550 (Ind. Ct. App. 1982); *Indiana Hosp. Licensing Council v. Women's Pavilion of South Bend, Inc.*, 420 N.E.2d

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5 Mr. Smith's contention of Indiana's interest is based on a theory that human life begins at conception, so that a fetus is a "child" and a man who has fertilized a woman's ovum is a "father." Yet this Court in *Roe* explicitly rejected such an effort to enshrine a particular theory of life as state law. *See Roe v. Wade*, 410 U.S. at 159-62; see also *Akron*, 462 U.S. at 444 ("a state may not adopt one theory of when life begins to justify its regulation of abortions"). The state of Indiana has not adopted Mr. Smith's theory of when life begins, but even if it had, such a law would be plainly unconstitutional and thus unavailable to Mr. Smith to support his claims.

1301 (Ind. Ct. App. 1981); *Unwed Father v. Unwed Mother*, 177 Ind. App. 237, 379 N.E.2d 467 (1978)]"); *see also Jane Doe v. John Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988), *petition for cert. filed*, May 10, 1989 (No. 88-1837); *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988), *applications for stay denied*, 108 S. Ct. 2136 (1988) (Stevens, J., in chambers), No. A-88-55 (U.S. July 22, 1988) (White, J.) (letter from Clerk of the Court). Indiana has a compelling interest in preserving and protecting the lives and health of pregnant women and protecting the constitutional rights of its citizens. *See Roe*, 410 U.S. at 162. There is no reason to believe that the state would seek to promote the interest asserted by Mr. Smith at the expense of Ms. Doe's right to life and liberty.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATE OF INDIANA
VIGO CIRCUIT COURT
JUVENILE DIVISION—1988 TERM
Cause No. 84CO1-8804-JP-185
Filed April 4, 1988

IN THE MATTER OF THE UNBORN CHILD DOE*

TEMPORARY RESTRAINING ORDER

Based upon Petitioner's verified Petition, and Motion for Temporary Restraining Order, and good cause appearing, it is hereby Ordered:

1. The Respondent, Jane Doe, is ordered to not have an abortion performed to terminate the child she is carrying.

2. This Temporary Restraining Order has been issued without prior notice to the Respondent for the reason that this Court has determined, on the basis of the Petitioner's Verified Petition, and Motion, copies of which were served upon Respondent with this Order, that irrepairable [sic] loss and injury would be suffered by Petitioner before notice could be served and a hearing scheduled.

3. The Court further orders any abortion clinic, abortion facility, employee thereof, and any physician to restrain from performing an abortion upon Jane Doe upon receiving notice of this Restraining Order.

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* The pseudonyms Jane Doe and John Smith are substituted for the parties' real names and previous pseudonyms as approved by the Indiana Court of Appeals. See Respondent's Brief in Opposition, 1, n. 1.

4. This Temporary Restraining Order shall expire on April 14, 1988, at 12:01 P.M.

By the Court

/s/ ROBERT HOWARD BROWN
Circuit Court Judge

ORDER TO SHOW CAUSE

To the Respondent:

You are hereby ordered to appear before the Honorable Judge of the above entitled Court on the 7th day of April, 1988, at the hour of 10:30 A.M., or as soon thereafter as counsel may be heard, then and there to show cause, if any there be, the Temporary Order restraining Respondent from having an abortion should not be made permanent.

DATED THIS 4th day of April, 1988.

By the Court

/s/ ROBERT HOWARD BROWN
Circuit Court Judge

STATE OF INDIANA
VIGO CIRCUIT COURT
JUVENILE DIVISION—1988 TERM
No. 84CO1-8804-JP-185

IN THE MATTER OF THE UNBORN CHILD DOE

ORDER

Comes now petitioner, John Smith, by co-counsel, and moves the Court to Order Production of Documents by a Non-party, Dr. Ramon R. Contreras, and the Court having considered the same, now orders Dr. Ramon R. Contreras to provide to petitioner, John Smith and his attorneys, James Bopp, Jr., BRAMES, MCCORMICK, BOPP & ABEL, and Dennis H. Stark, FLESCHNER, FLESCHNER, TANOOS, STARK & NEWLIN, documents as follows:

1. True and accurate copies of all medical records in his possession concerning the respondent, Jane Doe.

2. A signed affidavit summarizing his testimony herein concerning the issues raised by this paternity action, the pregnancy of respondent, and any proposed termination of said pregnancy.

3. The above documents are to be provided to co-counsel for petitioner this 5th day of April, 1988.

/s/ ROBERT HOWARD BROWN
Judge, Vigo Circuit Court

IN THE

SUPREME COURT OF INDIANA

No. 88A01-8804-CV-112

Filed Apri 13, 1988

JANE DOE

Defendant-Appellant,

—v.—

JOHN SMITH

Plaintiff-Appellee.

Appeal from the Vigo Circuit Court, Juvenile Division. Cause Caption, "In The Matter of Unborn Child H.," Cause No. 84CO1 8804 JP 185. The Honorable Robert H. Brown, *Circuit Judge*.

NOTICE TO THE COURT

Jane Doe, by counsel, notifies the Court of an inaccuracy in her "Verified Petition for Emergency Appeal," filed April 11, 1988, and her desire to correct the same. This cause is not of an immediate emergency nature as she is not presently pregnant.

In explanation, she wanted to express to the Court the intimate and private nature of her decision to terminate her pregnancy. Faced with the decision of continuing with an unwanted pregnancy and with violating a court order, she made the decision she felt was right. She arrived at the decision to terminate her pregnancy after consultation with her family and her physician. She did what she had to do to protect both her physical and emotional health.

Because of her action to terminate her pregnancy, there is no longer an immediate health threat to Jane Doe by delay in this suit. However, because of potential sanctions against her, and because this case concerns pregnancy and abortion and as such is uniquely "capable of repetition yet evading review," it is not moot. *Roe v. Wade*, 410 U.S. 113 (1973). Jane Doe asserts that the order enjoining her from seeking medical services to terminate her first trimester pregnancy was transparently invalid and wholly outside the Circuit Court's jurisdiction.

The case still presents a matter of great public importance, and, indeed, of an emergency nature to other women, because the uncorrected order of the Circuit Court invites it and other Indiana courts to engage in the same pernicious and impermissible inquiry into, and overruling of, a competent adult woman's decision to terminate her first trimester pregnancy. Not only does the very nature of the inquiry violate a woman's constitutional right to privacy in this decision-making process, but the delay necessarily occasioned by such a procedure impermissibly burdens a woman's freedom of choice. It has already been ten days since Jane Doe was enjoined from exercising her private choice.

Jane Doe still requests that this Court assume jurisdiction of the case and determine the legal issues presented. Furthermore, because of the changed circumstances, Jane Doe requests an additional ten days to submit supplemental briefs on the substantive and mootness issues.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing was read by me over the telephone to the following attorney for John Smith on Wednesday morning, April 13, 1988. A copy has also been sent to him by U.S. mail, postage prepaid, this 13th day of April, 1988:

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/s/ RICHARD A. WAPLES
Richard A. Waples